

the banking secrecy of Switzerland and waive any information about the identity of tax evaders. Furthermore, it undermines the intention of the EU Commission to focus on an automatic exchange of information and complicate negotiated amendments of the Savings Directive with Switzerland and as well with Luxembourg and Austria.<sup>456</sup>

The problem with Perdelwitz' assessment is that, equal win-win situations never exist in complex cases like this. Furthermore, his evaluation of the benefits and disadvantages is subjective. Perdelwitz ignores the fact that the UK and Austria receive a considerable amount of money without doing anything. All future tax collection will also be made by the Swiss paying agent. Crucially, this agreement must not ultimately undermine the aims of EU Commission. One difficulty faced by Swiss banks and intermediaries is that punishment of clients with untaxed assets, employees and the corporation which helped the client to evade tax is indeterminate. Regularising the past enables agreement on an automatic exchange of information with foreseeable consequences.

#### **3.7.1.4 Loopholes**

Several authors<sup>457</sup> mention loopholes in the agreement. While some certainly do exist, it must be remembered that every agreement has loopholes, since it is impossible to regulate everything in just a few pages. There are several thousands of advisors and lawyers searching for loopholes pitted against just a few dozen people who develop, negotiate and decide on the law.

One of the most frequently cited loopholes is the exclusion of discretionary structures like many of the Liechtenstein Foundations. However, while most Liechtenstein foundations are discretionary from a legal point of view, many are not discretionary from a tax point of view, due to an existing contract of mandate, the influence of the beneficiary as a member of the board or by some kind of instructional right. In the case of the foundation being a standalone entity unconnected to a settlor or beneficiary, a look-through would be unfair since the foundation is the legal owner of the assets. If a "fake" discretionary structure was found to be treated as a "real" discretionary structure, the anti-abuse<sup>458</sup> article would be applied.

In addition, there is the criticism about the possibility of relevant persons moving their assets to another jurisdiction before January 2013. Article 18 of the agreement states that Switzerland has to provide HMRC with data about the ten jurisdictions most frequently chosen by clients who closed their accounts or transferred their assets out of Switzerland. Of course, this will not generate surprising in-

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<sup>456</sup> Perdelwitz, 2011, 500 & 503.

<sup>457</sup> Perdelwitz, 2011, 496 - 503.

<sup>458</sup> CH-UK Tax Agreement, 2011, art. 33.